

**Penman, Crystal**

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**Subject:** Iowa League of Cities  
**Location:** 3233 WJC-E

**Start:** Fri 11/15/2013 2:00 PM  
**End:** Fri 11/15/2013 2:30 PM

**Recurrence:** (none)

**Meeting Status:** Meeting organizer

**Organizer:** Stoner, Nancy

**Required Attendees:** Sawyers, Andrew; Neugeboren, Steven; Garbow, Avi

**Optional Attendees:** Kopocis, Ken

**Inside Eighth Circuit**

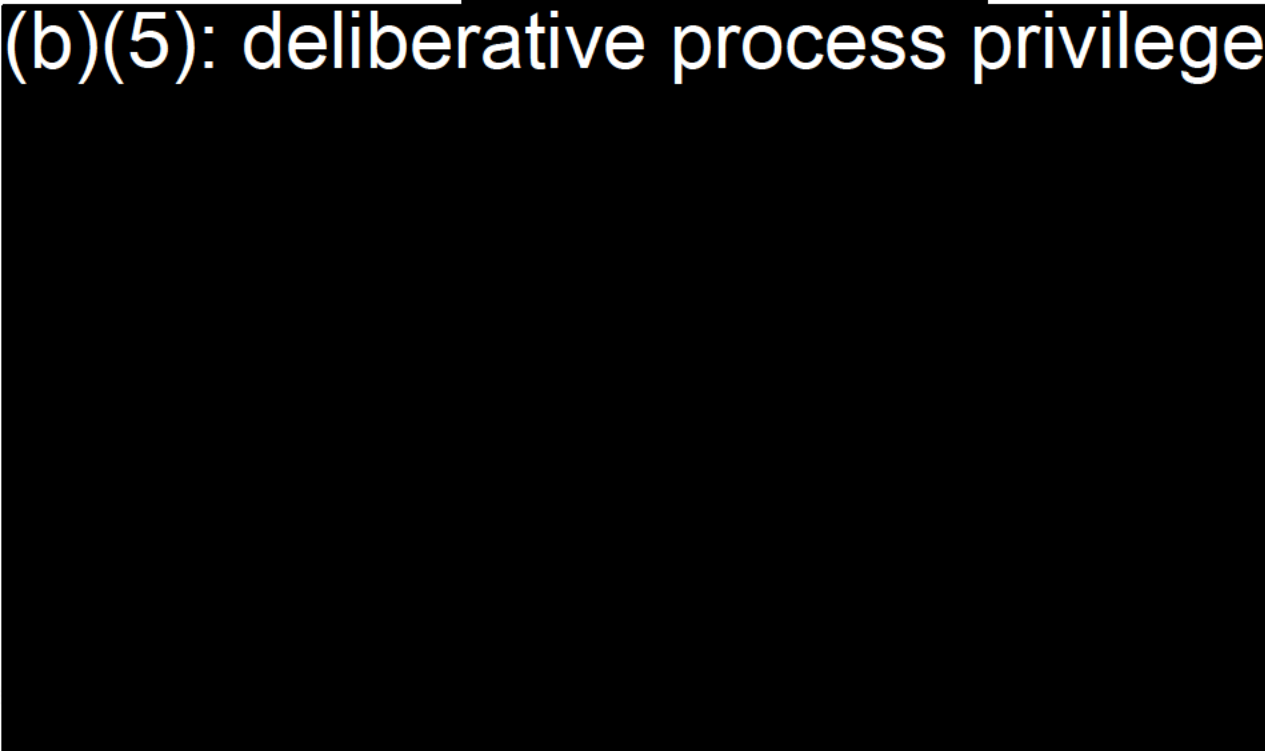
- This is a significant decision that changes the landscape on the way we look at permits at facilities that blend. We are still trying to work through potential issues.
- All NPDES permits, including those for POTW discharges, need to have a bypass provision that is at least as stringent as EPA's regulations at 40 CFR 122.41(m).
- For a facility that blends, the permit/fact sheet should have a clear identification of the treatment train that will be used during dry and wet weather.
- Permits for POTWs that blend will not have internal permit limitations (unless end-of-pipe effluent limits are impracticable) , only end-of-pipe limits.
- NPDES permits are to require monitoring to yield data that is representative of the monitored activity (see 122.48(b)). For facilities that blend during wet weather, permits should clearly specify that compliance monitoring include end-of-pipe monitoring when wet weather treatment trains are in operation.

**(b)(5): deliberative process privilege**

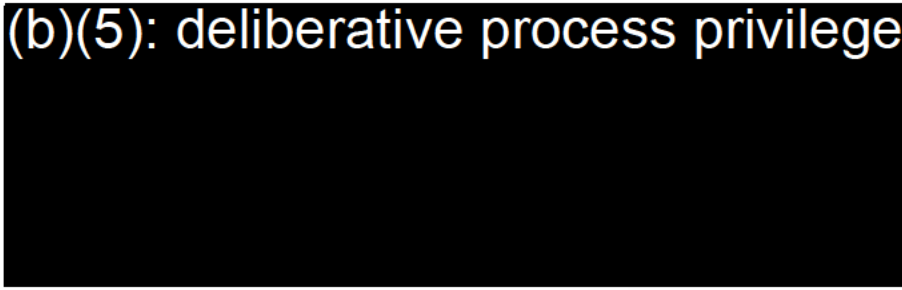


**Outside of Eighth Circuit**

**(b)(5): deliberative process privilege**




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What we said in Region 7

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October 30, 2013 Meeting

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Subsequent Discussions

(b)(5): deliberative process privilege



**Bethel, Heidi**

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**From:** Weiss, Kevin  
**Sent:** Monday, November 18, 2013 3:23 PM  
**To:** Nagle, Deborah  
**Cc:** Bosma, Connie  
**Subject:** FW: Question  
**Attachments:** Inside Eighth Circuit.docx; Side Treatment fact sheet.doc

Deborah:

I attached 2 things:

- 1) the talking points we gave to Nancy Stoner (these were the points we discussed in Region 7)
- 2) a summary of the approach discussed at July 2011 public workshop on SSOs and Peakflows. (We didn't go over these in the 4-State meeting in Region 7 last week, but did discuss them with Mike Tate of KS the week before on a call).

Let me know if you have any questions.

Kevin

-----Original Message-----

**From:** Nagle, Deborah  
**Sent:** Monday, November 18, 2013 2:33 PM  
**To:** Bosma, Connie  
**Subject:** Question

Hi Connie-

I am on my way to the NACWA legal conference and I know you armed Nancy with talking points on how we intend to apply the Iowa League of Cities decision.

**(b)(5): deliberative process privilege**

Thanks. Hope all is calm today.

-Deborah

### Inside Eighth Circuit

- This is a significant decision that changes the landscape on the way we look at permits at facilities that blend. The Agency will faithfully apply the decision within the Eighth Circuit. We are still trying to work through potential issues.
- All NPDES permits, including those for POTW discharges, need to have a bypass provision that is at least as stringent as EPA's regulations at 40 CFR 122.41(m).
- For a facility that blends, the permit/fact sheet should have a clear identification of the treatment train that will be used during dry and wet weather.
- Permits for POTWs that blend will not have internal permit limitations (unless end-of-pipe effluent limits are impracticable) , only end-of-pipe limits.
- NPDES permits are to require monitoring to yield data that is representative of the monitored activity (see 122.48(b)). For facilities that blend during wet weather, permits should clearly specify that compliance monitoring include end-of-pipe monitoring when wet weather treatment trains are in operation.
- In the Eighth Circuit, the bypass provision does not impose second secondary treatment standards on side-stream treatment prior to blending. In addition, the fact that side-stream treatment does not provide biological treatment does not trigger the bypass provision.

### Outside of Eighth Circuit

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## Side Stream Treatment in Blending Scenarios

### Overview of Approach:

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### Discussion of Approach

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## **Background: Technology Issues**

- Different technologies can be used for side treatment
  - Technologies include ballasted flocculation, settling (lagoons), polymer addition, trickling filters, and biologically enhanced ballasted flocculation, sand filtration.
    - The performance of the different approaches varies – some are able to meet secondary treatment performance standards, while others do not.
    - Technologies that do not provide biological treatment typically focus on removal of solids.
- Most technologies provide physical/chemical treatment, which focuses on TSS removal, but do not remove soluble BOD  
These include, ballasted floc
- Two recent studies, one by the Interstate Environmental Commission in conjunction with EPA's ORD and the Water Environment Research Foundation, measured pathogens in blended POTW flows.
  - The studies considered facilities where flows diverted around biological treatment received only primary treatment (no side stream treatment) prior to recombination and disinfection.
  - The studies found that generally, flows that did not receive secondary treatment had higher pathogen levels than flows that received secondary treatment
  - TSS particles in primary treated effluent contained high levels of pathogens that were not adequately analyzed when using standard test methods. In addition, TSS particles were thought to decrease the efficiency of disinfection.
  - EPA is not aware of studies on pathogen removal for various side treatment technologies.
- Discuss performance of selected technologies.



Background:

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## (b)(5): deliberative process privilege

- During work on Blue Plains permit, agreed that permit can approve bypass where Federal or State enforcement order requires implementation of feasible alternatives.
- A number of Federal and State enforcement orders call for side stream treatment at POTWs (some serving combined sewers), including:
  - Toledo, OH (ballasted flocculation)
  - Hamilton County, OH (ballasted flocculation at SSO location)
  - Onondaga County, NY (State order - ballasted flocculation)
  - Cleveland, OH (Ballasted flocculation being considered)
  - Blue Plains (ballasted flocculation)
  - Knoxville, TN (pilot testing biological ballasted flocculation)

Options:

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DOCUMENT 5

**Bethel, Heidi**

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**From:** Neugeboren, Steven  
**Sent:** Monday, November 18, 2013 10:37 AM  
**To:** Stoner, Nancy  
**Subject:** RE: EPA Implementation of the Iowa League decision

Did Kevin send you something on Friday? (b)(5): deliberative process; attorney-client

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**From:** Stoner, Nancy  
**Sent:** Monday, November 18, 2013 10:27 AM  
**To:** Neugeboren, Steven  
**Subject:** Re: EPA Implementation of the Iowa League decision

I don't seem to have the revised talkers. I have the ones Kevin did, not the ones you did. Pls e-mail. Thx

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**From:** Neugeboren, Steven  
**Sent:** Monday, November 18, 2013 8:54:56 AM  
**To:** Stoner, Nancy  
**Subject:** Re: EPA Implementation of the Iowa League decision

Meeting in Kansas City last week with region 7 states and municipal reps.

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**From:** Stoner, Nancy  
**Sent:** Monday, November 18, 2013 4:27:08 AM  
**To:** Neugeboren, Steven  
**Subject:** Re: EPA Implementation of the Iowa League decision

What meeting does he refer to? Also what correspondence?

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**From:** Neugeboren, Steven  
**Sent:** Sunday, November 17, 2013 8:12:37 PM  
**To:** Garbow, Avi; Mallory, Brenda; Stoner, Nancy; Sawyers, Andrew; Nagle, Deborah; Bosma, Connie; Weiss, Kevin; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken  
**Subject:** Fw: EPA Implementation of the Iowa League decision

See note from John Hall below.

(b)(5): deliberative process; attorney-client

I said in Kansas City that the decision is binding in the 8th circuit and that its implications outside are being considered by the agency. (b)(5): deliberative process; attorney-client

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**From:** John Hall <[jhall@hall-associates.com](mailto:jhall@hall-associates.com)>  
**Sent:** Friday, November 15, 2013 6:09:12 PM  
**To:** Neugeboren, Steven  
**Cc:** Gary Cohen; [prosenman@hall-associates.com](mailto:prosenman@hall-associates.com); Bruce Bergman; 'terrytimmins@iowaleague.org'  
**Subject:** EPA Implementation of the Iowa League decision

Steve

I understand that EPA informed the public and several states that the Iowa League decision does not apply outside of the 8<sup>th</sup> Circuit. We have outstanding correspondence to EPA on this issue that has been ignored for months. Would you please be so kind as to confirm or deny that EPA Headquarters has reached a determination on this issue since I understand it was you that made the announcement in response to questions raised at the meeting? I presume that EPA would not have flown 3 people from EPA Headquarters to a meeting in Region VII to address this issue if a final position had not been reached after EPA decided to not appeal the decision to the Supreme Court. I look forward to your prompt response to this inquiry.

Regards

*John*

John C. Hall  
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**Bethel, Heidi**

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**From:** Theis, Joseph  
**Sent:** Tuesday, November 26, 2013 8:34 AM  
**To:** Vinch, James; King, Carol  
**Cc:** Denton, Loren; Morrissey, Alan  
**Subject:** RE: More from BNA on Iowa League

Jim,

(b)(5): deliberative process privilege

Joseph G. Theis  
Acting Deputy Director  
Water Enforcement Division  
Office of Enforcement and Compliance Assurance  
U.S. EPA (MC 2243A)  
1200 Pennsylvania Ave, NW  
Washington, D.C. 20460  
(202)564-4053

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**From:** Vinch, James  
**Sent:** Tuesday, November 26, 2013 7:49 AM  
**To:** DeMarco, Carol  
**Cc:** Denton, Loren; Theis, Joseph; Morrissey, Alan  
**Subject:** More from BNA on Iowa League

(b)(5): deliberative process privilege

[REDACTED]

Water Pollution  
Confusion, Lawsuits Are Expected Result  
Of EPA Decision to Limit Application of Ruling



By [Amena H. Saiyid](#)

Nov. 25 — The Environmental Protection Agency's decision to limit a U.S. appeals court ruling on mixing zones and the blending of treated wastewater to the areas within the appeals court's jurisdiction is bound to trigger litigation and regulatory inconsistency, an attorney said at a Clean Water Act conference. "There will be more litigation. It's easy to predict that," said Gary Cohen, special counsel for Hall & Associates, based in Washington, D.C. He spoke Nov. 22 at the Clean Water Act Law Seminar, sponsored by the National Association of Clean Water Agencies Nov. 20-22 in San Antonio. He was referencing comments by Nancy Stoner, acting assistant administrator for the EPA Office of Water, who said at the conference Nov. 20 that the ruling by the U.S. Court of Appeals for the Eighth Circuit only applied in that court's jurisdiction, and that the agency will apply the decision on a case-by-case basis in other areas ([225 DEN A-17, 11/21/13](#)).

Cohen pointed out that the Eighth Circuit is the only appellate court that covers states in four EPA regions, namely 5,6, 7, and 8.

Cohen cited the regulatory confusion that may arise in EPA Region 7, which includes Nebraska, Iowa, Missouri, and Kansas. The Eighth Circuit jurisdiction does not include Kansas.

"Take Region 7 for instance," he said. "Will the EPA apply the Eighth Circuit ruling in all the states, but in Kansas they will apply something else?" Cohen represented the Iowa League of Cities before the Eighth Circuit in successfully challenging the EPA's policies for managing wastewater flows during heavy rains.

The Eighth Circuit covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

#### No Criteria for Case-by-Case Analysis

Cohen said Stoner did not even specify what criteria the agency would apply, and whether the case-by-case determination would be different in each state or community.

"That remains to be seen," he said.

A three-judge panel for the Eighth Circuit held in March that the EPA needs to go through a formal rulemaking, with notice and comment, before it can bar the use of mixing zones to meet standards for bacteria at wastewater discharge points in receiving waters designated for primary-contact recreation, and to prohibit blending of partially and fully treated wastewater inside treatment plants. The court also ruled that EPA exceeded its Clean Water Act authority in attempting to prohibit the practice of blending (*Iowa League of Cities v. EPA*, 8th Cir., 2013 BL 77650, No. 11-3412, 3/25/13; [58 DEN A-9, 3/26/13](#)). When a challenge to a rule is being undertaken, it can only be heard in one circuit court, said, asking, "What happens if it's not in the D.C. Circuit? Is the EPA not going to take a position outside the District of Columbia?"

Cohen also took issue with Stoner for saying that the agency needs to reconcile the Eighth Circuit decision on blending with the EPA bypass rule at [40 C.F.R. 122.41\(m\)\(1\)](#) as a reason for not applying the ruling nationwide.

He cited the appeals court ruling that the bypass rule—which forbids diversions around secondary treatment processes unless no feasible alternatives exist—merely "piggy backed" on existing effluent limitations, but did not prescribe any treatment technology or method.

#### Procedural Violations Alleged

Cohen's remarks resonated with the wastewater management community, and with Sen. Charles Grassley (R-Iowa). The Iowa League of Cities used as the basis for its lawsuits the letters the EPA wrote to Grassley in June and September of 2011 to explain the agency's position on blending and mixing zones. In a Nov. 22 statement, Grassley and Sen. David Vitter (R-La.), the ranking member on the Senate Environment and Public Works Committee, criticized the EPA for not applying the ruling nationwide in violation of the Administrative Procedure Act.

"The EPA tried to violate basic rule-making procedures and got caught," Grassley said. "Now, the agency is enforcing the violation everywhere except for the court circuit where it lost its case. This isn't the way to conduct agency business."

Of EPA's actions, Vitter said, "They need to unambiguously and fairly apply the invalidation of this illegal water treatment regulation on a national level."

To contact the reporter on this story: Amana H. Saiyid in Washington at [asaiyid@bna.com](mailto:asaiyid@bna.com)

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